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Nos. 88-515 and 88-525

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, Attorney General of the United States

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, Attorney General of the United States,
Cross-Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF AMICUS CURIAE OF JOHN W. OLIVO, JR.

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42 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

INTRODUCTION 4

SUMMARY OF ARGUMENT 12

ARGUMENT

I. THE COURT SHOULD NOT DEFER TO THE JUDGMENT OF CONGRESS AND THE COMMISSION THAT NO FEASIBLE AND EFFECTIVE TECHNOLOGICAL METHODS EXIST TO RESTRICT CHILDREN'S ACCESS TO ADULT MESSAGES 14

II. A BAN ON "INDECENT" ADULT MESSAGES IS IMPERMISSIBLE SINCE IT MAY ONLY AFFORD A MARGINAL DEGREE OF PROTECTION BEYOND THAT AVAILABLE VIA EXISTING TECHNOLOGICAL METHODS FOR RESTRICTING CHILDREN'S ACCESS TO THESE MESSAGES . . . 23

III. THE BEEP-TONE METHOD IS A FEASIBLE AND EFFECTIVE WAY TO RESTRICT CHILDREN'S ACCESS TO ADULT MESSAGES WITH MINIMAL INTRUSION ON THE FIRST AMENDMENT RIGHTS OF THE ADULT POPULATION 27

CONCLUSION. 36

TABLE OF AUTHORITIES

Cases: Page

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) . .24-26

Bonito Boats, Inc. v. Thunder Craft Boat, Inc., 109 S.Ct. 971 (1989). 28

Butler v. Michigan, 352 U.S. 380 (1957) 25

Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984) 7, 29

Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986) 7, 32

Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir. 1988), cert. denied, No. 88-37 (Oct. 31, 1988). 2, 8, 10-11, 21-22, 27, 29-30, 32

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) 14-15, 21

Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission, 693 F.Supp. 332 (E.D. Pa. 1988) 31-33, 36

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 36

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)..15

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) . . 34

Statutes:

35 U.S.C. §§101, 102, 103, 112 .. 28

Communications Act of 1934, 47 U.S.C. et seq.:

47 U.S.C. §223(b) (Supp. III 1988) 3, 4

47 U.S.C. §§223(b)(1) and (b)(2) (Supp. IV 1986) 6

Miscellaneous:

134 Cong. Rec. H1691 (daily ed. Apr. 19, 1988) . . .16

Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials:

Third Notice of Proposed Rulemaking, 51 Fed. Reg. 26,915 (1986) 7

Third Report and Order, 2 F.C.C. Rcd 2714 (1987) . .8-9 26, 31-32

I. Pool, Technologies of Freedom 75 (1983) 34

Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. (1987) 17-20

STATEMENT OF INTEREST

John W. Olivo, Jr., an attorney, and inventor in the field of telephone communications, holds a Bachelor of Science degree in Electrical Engineering from Lafayette College and has electrical engineering experience. In October of 1986, while a member of the New York Law School Media Law Clinic, Amicus submitted a proposal to the Federal Communications Commission (Commission or FCC) that subsequently became known as the "beep-tone" method. Under this proposal, an adult dial-it message provider would insert at the beginning of each recorded message a "beep-tone" which, when heard by a "beep-tone" listening device located on the caller's premises, would cause the call to be blocked. In this way, parents could limit their children's

access to adult messages like those offered by Sable Communications of California, Inc., appellee and cross-appellant, at a very modest cost.

Although the beep-tone method proposed by Amicus received qualified support from several major telephone companies, the FCC summarily rejected it without ever considering its technical merit. In Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2nd Cir. 1988), cert. denied, No. 88-37 (Oct. 31, 1988), the Second Circuit, after commenting on the lack of evidentiary support for the FCC's rejection of the beep-tone method, directed the FCC to reopen its proceeding when a prototype beep-tone device became available.

Since that time, a beep-tone device has been manufactured in

prototype and has been tested to ensure dependability. It is presently the subject of a United States Patent Application, and two claims directed to telephone usage of the beep-tone device have been allowed by the United States Patent and Trademark Office. To-date, however, the FCC has failed to consider the device's applicability, and even neglected to offer it to Congress as an alternative when Congress held its fact-finding hearings prior to enacting the current version of Section 223(b) of the Communications Act of 1934, 47 U.S.C. (Supp. III) §223(b).

Amicus submits this Brief for the purpose of informing the Court that there currently exist feasible and effective methods for restricting

children's access to adult messages, such as the beep-tone method, and to persuade the Court that an outright ban on "indecent" interstate telephone communications for commercial purposes is not the least intrusive measure for advancing the government's interest in protecting the well-being of children.

Both parties have consented to the filing of this brief.

INTRODUCTION

Section 223(b) of the Communications Act of 1934, as amended in August 1988, 47 U.S.C. (Supp. III) §223(b), prohibits any person from making "obscene or indecent" interstate telephone communications for commercial purposes. The object of Section 223(b) is to protect children from adult message services provided

for a fee over the telephone. As the government observes, the current version of Section 223(b) banning "indecent" adult message services rests, in large measure, on the judgment of Congress "that there was no sufficiently effective technological method of eliminating the access of children to dial-a-porn short of an outright ban." (Govt. brief at 13). That judgment was "illuminated by the FCC's experience in this area" under the prior version of Section 223(b) (Govt. brief at 20).

Enacted in 1983, the prior version of Section 223(b) prohibited any person from using telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen

years of age or to any other person without that person's consent". 47 U.S.C. §223(b)(1) (Supp. IV 1986). That enactment provided, however, an affirmative defense to prosecution if the defendant restricted access to adults "in accordance with procedures which the Commission shall prescribe by regulation". 47 U.S.C. §223(b)(2) (Supp. IV 1986).

As the government further observes, the FCC over the next four years sought to devise regulations prescribing methods under which adult message services could be offered without being readily accessible to children. (Govt. brief at 8-12). The first and second set of regulations promulgated by the FCC under Section 223(b) were set aside in whole or in part by the Second

Circuit and remanded to the Commission. Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984) (Carlin I); Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986) (Carlin II).

Following remand in Carlin II, the FCC issued its Third Notice of Proposed Rulemaking in July 1986, 51 Fed. Reg. 26,915 (1986), inviting public comment on methods for restricting children's access to adult message services. In response to that invitation, Amicus, who was then a student enrolled in the New York Law School Media Law Clinic, submitted a novel proposal known as the "beep-tone" method which was described by the Second Circuit as follows:

> [Olivo] proposed that [an adult message] provider preface its

> message with a three-part tone burst designed to activate a listening device installed at the customer's premises. Upon "hearing" the tone burst, the device would immediately disconnect the telephone, so that the caller could not hear the message. A "listening" device could be installed at the terminal block or at individual outlets. While such devices are not yet manufactured, Olivo suggested similar technology presently costs between $5 and $10. Southwestern Bell, Bell Atlantic, and NYNEX commented favorably on Olivo's proposal, though the latter two added that the system needed further study.

Carlin Communications, Inc. v. FCC, 837 F.2d 546, 554 (2d Cir. 1988) (Carlin III), cert. denied, No. 88-37 (Oct. 31, 1988).

Seven months later, in May 1987, the FCC released its third set of regulation implementing Section 223(b). Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene

Materials, Third Report and Order, 2 F.C.C. Rcd 2714 (1987) (Third Report). Although prescribing access codes and message scrambling, the FCC rejected the beep-tone method proposed by Amicus after giving that proposal only cursory consideration in a single footnote. Id. at 2724 n.13. The FCC, for example, assumed that the "beep tone device would [not] be employed in a significant percentage of households", because an Ameritech study had shown that only a small percentage of households would purchase programmable blocking devices for use in their homes if the price were other than nominal. Id. at 2717-2718. The Ameritech study, however, did not focus on the household demand for the simpler, less expensive beep-tone device.

The Commission's third set of regulations was challenged in the Second Circuit, which issued Carlin III in January 1988. Although upholding these regulations, the Second Circuit ruled that the Commission had failed to give adequate consideration to the beep-tone method:

> Theoretically, a beep-tone device, suggested by the Media Law Clinic of New York Law School and qualifiedly supported by three telephone companies, would avoid the problems associated with access codes and scrambling, at a relatively low cost for providers and customers. The Commission observed that since it has not been shown that a significant percentage of households would use this beep-tone device, the device would not be effective in achieving the purposes of Section 223, a conclusion having little or no evidentiary support in the record. However, as the Commission noted, the beep-tone device has not actually been manufactured, even in prototype. As some carriers

> raised questions concerning its technical feasibility, the Commission held that "substantial limitations exist with establishment of this device as a regulatory requirement at this time." 2 F.C.C. Rcd at 2724 n. 13 (emphasis added). When such a device is manufactured in prototype so that its scientific feasibility can be determined, we direct the FCC to reopen its proceedings to consider the feasibility, costs and benefits of adding its use as an optional defense. In this way, the Government can fulfill its "heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression." Carlin I, 749 F.2d at 121.

Carlin III, 837 F.2d at 556.

Since this decision, a prototype of the beep-tone device has been constructed under the direction of Amicus by Telcom Design, Inc., an electronics laboratory in Seattle, Washington. This beep-tone prototype has passed a talk-off immunity test designed to ascertain whether or not

devices can be falsely triggered by human voices, and, in January of 1989, two claims directed to the beep-tone device were allowed by the United States Patent and Trademark Office in patent application Serial Number 091,646, filed August 31, 1987. The FCC, however, still has not considered the device and probably never will now that the April 1988 version of Section 223(b), which eliminates the previous version's defenses, has been enacted.

SUMMARY OF ARGUMENT

While there are many reasons why Section 223(b), insofar as it bans "indecent" interstate telephone communications for commercial purposes, violates the First Amendment, Amicus focuses on the flawed legislative finding on which Section

223(b) rests: that no sufficiently effective technological method exists to restrict children's access to adult messages. Because this finding is exclusively based on the FCC's experience, and because the Commission did not fairly consider at least one technological alternative, namely the beep-tone method proposed by Amicus, this Court need not, and should not, defer to the legislative finding (Point I). Moreover, because Congress and the Commission failed to assess the level of effectiveness of various technological methods considered, the ban on "indecent" telephone communications may afford only marginal protection of children beyond the protection afforded by technological alternatives such as the beep-tone method. And, because

such marginal protection clearly does not outweigh the significant intrusions on the First Amendment rights of the adult population, the ban is constitutionally impermissible (Point II). Finally, the beep-tone method is not only a feasible and effective way to restrict children's access to adult messages, but is also one of the least intrusive, technological regulatory measures available (Point III).

I. THE COURT SHOULD NOT DEFER TO THE JUDGMENT OF CONGRESS AND THE COMMISSION THAT NO FEASIBLE AND EFFECTIVE TECHNOLOGICAL METHODS EXIST TO RESTRICT CHILDREN'S ACCESS TO ADULT MESSAGES.

In First Amendment cases, the Court has typically "afford [ed] great weight to the decision of Congress and the experience of the Commission". Columbia Broadcasting

System, Inc. v. Democrative National Committee, 412 U.S. 94, 102 (1973). But deference to the judgment of Congress and the Commission is not unlimited. The Court must carefully scrutinize that judgment whenever "the Commission has not fulfilled its task with appropriate sensitivity to the interests of free expression." Id. at 103. In such cases the Court must independently assess the legislative findings on which the judgment rests, because "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978).

The Government's argument for an across-the-board ban on "indecent" messages rests, in large measure, on

the conclusion reached by Congress "that there was no sufficiently effective technological method of eliminating the access of children to dial-a-porn short of an absolute ban." (Govt. brief at 13). To be sure, there were numerous statements to that effect made during the House and Senate debates prior to enactment of Section 223(b). See, e.g. 134 Cong. Rec. H1691 (daily ed. April 19, 1988) (Statement of Rep. Bliley) ("it became clear that there was not a technological solution that would adequately and effectively protect our children from the effects of this material. We looked for effective alternatives to a ban -- there were none"). But colloquy statements, in and of themselves, do not form an

adequate evidentiary basis for the critical legislative finding.

Nor, for that matter, does the record generated during the Fall 1987 Congressional subcommittee hearing. See generally, Telephone Decency Act of 1987: Hearings on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. (1987) ("1987 Hearing"). Concededly, the need for examination of technological solutions to the adult message problem was not lost on the subcommittee holding the hearing. As its chairman stated in his opening remarks, "technology may well be the key in delicately balancing the interests of free speech and the protection of children." 1987 Hearings at 2 (opening statement of

Rep. Markey). Nevertheless, despite the chairman's announcement that a "very significant focus" of the hearing would be on the "technological regulatory alternatives proposed by the FCC and others", ibid., there was, in fact, very little focus on the technological issues during the hearing. Instead, much of the testimony given at the Fall 1987 hearing consisted of proclamations against adult messages, general expression of concern about the gravity of the problem of children's access to such messages, and questions as to how large the adult message industry was and why telephone companies could not simply refuse to serve adult message providers.

More importantly, one of the potential technological solutions -- the beep-tone method -- was never even considered by Congress during the course of that hearing. Indeed, only one witness even mentioned the existence of the beep-tone method.[1] The other witnesses, including Diane S. Killory, the Commission's general counsel, all completely ignored this potential technological solution in

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[1] Barry W. Lynn, legislative counsel for the American Civil Liberties Union, briefly alluded to the beep-tone method in his prepared written statement. 1987 Hearings at 44. That statement provided, among other things, a broad overview of the available technology. During Mr. Lynn's discussion of customer premises equipment (CPE) blocking devices, one paragraph was offered on Amicus "alternative solution". Id. A short explanation of how the beep-tone method works was given and the technology was described as already in use in other areas of telephone operations. Mr. Lynn's statement thereafter returned to its discussion of CPE blocking devices and their prices, never again mentioning the beep-tone's applicability.

their testimony and prepared written statements. 1987 Hearings at 191-214 (testimony of Diane S. Killory). Indeed, Ms. Killory's failure to discuss the beep-tone method is especially troublesome, given that the Second Circuit had questioned the Commission's rejection of the beep-tone method only nine days before the subcommittee hearing, during the oral argument in Carlin III.

It is thus clear that the critical legislative finding -- that no feasible and effective technological solutions existed to restrict children's access to adult messages -- was not, as the Government asserts, based upon "extensive consideration [by Congress]" (Govt. brief at 19-20), but, rather, was based exclusively on the FCC's experience in

this area. And little or no deference is owed the Commission's experience since it "[did] not fulfill its tasks with appropriate sensitivity to the interests of free expression". Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 103.

The Commission, in particular, rejected the beep-tone method even though, as the Second Circuit observed, the beep-tone method "[t]heoretically ... would avoid the problems associated with access codes and scrambling at a relatively low cost for providers and customers." Carlin III, 837 F.2d at 556. The Second Circuit also found the Commission's conclusion that demand for beep-tone devices would be insignificant to "hav[e] little or no

evidentiary support in the record." Ibid. Indeed, with the successful manufacture and testing of the beep-tone device, what had been the Commission's only non-frivolous reservation about the beep-tone method -- that no such device was currently manufactured -- is no longer valid.[2]

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[2] Even this reservation was dubious because the technology on which the beep-tone method is based had for years been routinely employed by telephone companies in customer premises equipment used to remotely disconnect a subscriber from the telephone network and allow remote loop and line testing prior to dispatching a repair person to the subscriber's premises.

II. A BAN ON "INDECENT" ADULT MESSAGES IS IMPERMISSIBLE SINCE IT MAY ONLY AFFORD A MARGINAL DEGREE OF PROTECTION BEYOND THAT AVAILABLE VIA EXISTING TECHNOLOGICAL METHODS FOR RESTRICTING CHILDREN'S ACCESS TO THESE MESSAGES

The critical legislative finding -- "that there was no sufficiently effective technological method of eliminating the access of children to dial-a-porn short of an outright ban" (Govt. brief at 13) -- is also fatally flawed in another respect. While Congress and the Commission judged the various technological alternatives to an outright ban ineffective, they failed to articulate the level of effectiveness expected of the methods proposed, including the beep-tone method, and thus left unclear the degree of additional protection expected from

an outright ban on "indecent" messages.

The Court confronted a narrower ban on dissemination of adult materials in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). At issue was the federal statute banning the mailing of unsolicited advertisements for contraceptives. Noting that "parents already exercise substantial control over the disposition of mail once it enters their mailboxes" and that "[they] must already cope with the multitude of external stimuli that color their children's perception of sensitive subjects", the Court declared the ban to be impermissible:

> This marginal degree of protection is achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults. We have previously made clear

> that a restriction of this scope is more extensive than the Constitution permits, for the government may not "reduce the adult population ... to reading only what is fit for children." Butler v. Michigan, 352 U.S. 380, 382 (1957). The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.

Id. at 73-74 (footnote omitted).

Similarly, in the case at bar, parents already exercise substantial control over the telephone in their homes, and presumably may exercise additional control through some of the technological methods for limiting their children's access to adult messages. Likewise, their children are already faced with a multitude of external stimuli that may deal with the very same subjects as adult messages. The ban on "indecent" adult messages thus may afford only a "marginal degree of

protection," id. at 73, to children beyond that available through the various technological methods found by Congress and the Commission to be lacking.

Given that real possibility, it was, therefore, incumbent on both Congress and the Commission to make findings on the level of effectiveness of each proposed technological method for limiting children's access to adult messages. While the Commission concluded that certain methods, e.g., the access code method, would provide a "high degree of effectiveness", Third Report, 2 F.C.C. Rcd at 2724 n.14, neither Congress nor the Commission made any findings on the level of effectiveness of other technological methods, including the beep-tone method.

Because no such findings were ever made, Congress may not enact an outright ban on "indecent" messages and reduce the level of discourse available over the telephone to that which would be suitable for a sandbox.

III. THE BEEP-TONE METHOD IS A FEASIBLE AND EFFECTIVE WAY TO RESTRICT CHILDREN'S ACCESS TO ADULT MESSAGES WITH MINIMAL INTRUSION ON THE FIRST AMENDMENT RIGHTS OF THE ADULT POPULATION

Notwithstanding the failure of Congress and the FCC to consider the merits of the beep-tone method, that method is both a feasible and effective way to restrict children's access to adult messages. Not only have three major telephone companies and the Second Circuit commented favorably on the beep-tone method, Carlin III, 837 F.2d at 554, 556, but

the United States Patent and Trademark Office (PTO) has recently allowed two patent claims directed towards telephone usage of the beep-tone method. (See p.12 supra.) This not only confirms the feasibility and effectiveness of the beep-tone method, 35 U.S.C. §112 (1988) ("in order for a claim to be allowed, [the applicant's disclosure] must enable any person skilled in the art to which it pertains ... to make and use the ... invention"), but also establishes that it is "new and useful", 35 U.S.C. §101 (1988), and further "novel" and "non-obvious" pursuant respectively to 35 U.S.C. §102 (1988) and 35 U.S.C. §103 (1988). See Bonito Boats, Inc. v. Thunder Craft Boat, Inc., 109 S.Ct. 971, 976 (1989). The latter finding by the

PTO further confirms that the beep-tone method was not among the existing technological alternatives previously rejected on the merits by Congress and the FCC.

As the Second Circuit observed in Carlin I, because a ban on "indecent" telephone communications is content-based, "[t]he Government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that any less intrusive on protected forms of expression." Carlin I, 749 F.2d at 121. In Carlin III the Second Circuit made clear that the FCC's reconsideration of the beep-tone method was necessary for the Govern-

ment to carry that burden. Carlin III, 837 F.2d at 556.[3]

The beep-tone method is far less intrusive than the methods prescribed by the FCC in its Third Report. It imposes only modest cost on adult dial-it message providers and telephone subscribers. The former merely need to preface their recorded messages with the specified beep-tone, and the latter merely need to purchase and install a nominally priced beep-tone device.[4]

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[3] Amicus recognizes that the government has urged the Court to apply a lower level of scrutiny than the Second Circuit applied in Carlin III (Govt. brief at 24-25). Amicus disagrees and concurs in the argument for strict scrutiny advanced by Sable, appellee and cross-appellant.

[4] The beep-tone device might even be "integrated" into the telephone handset, thus reducing its price even further. Such integrated beep-tone devices would be difficult, if not impossible, for

(continued...)

By contrast, the access code method imposes substantial financial costs on each adult message provider. Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission, 693 F.Supp. 332, 338 (E.D. Pa. 1988) ("Fabulous Associates"); Third Report, 2 F.C.C. Rcd at 2724-25 n.23. Moreover, because one must apply for an access code, "access to adult messages [is conditioned on] loss of anonymity as far as message providers are concerned". Fabulous Associates, 693 F.Supp. at 338. That condition would have a substantial chilling effect, given "the societal opprobrium associated with dial-a-porn messages and the probable

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[4](...continued)
children to disable. Even "stand-alone" beep-tone devices would be difficult to disable if enclosed in lockable boxes.

undesirability of having one's name and address at the disposal of message providers and other third parties." Id. (footnote omitted). See also Carlin II, F.2d at 856 n.7 ("potential chilling effect"); but cf. Carlin III, F.2d at 557 (declining to consider "potential chilling effect" argument).

Likewise, message scrambling would impose greater costs on both adult message providers and their customers than would the beep-tone method. Third Report, 2 F.C.C. Rcd at 2720-21. Moreover, unless a uniform nationwide adult message scrambling technique were adopted, potential customers might have to buy separate descramblers for each adult dial-it message service they call.

Some local telephone companies, either voluntarily or pursuant to a directive from a state public utilities commission, have reassigned adult message providers to an exchange with a separate prefix, to which access may be pre-blocked at the telephone subscriber's request. Fabulous Associates, 693 F.Supp. at 339. While the restricted exchange method is clearly a less restrictive alternative than the access code method, it nevertheless has several restrictive features not inherent in the beep-tone method. Placement of any message provider into the restricted exchange will necessarily limit the message provider's potential audience because many telephone subscribers will request that access to that exchange be pre-blocked. The

placement decision, which is typically made by the telephone company, will, therefore, have a significant impact on the size of the message provider's potential listening audience. If "state action" is shown, there may even be an impermissible prior restraint. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 n.8 (1975) (classification of musical as not in community's "best interest" placed inevitable restraint on speech). Even if no state action is present, the telephone company has become involved in content-based decisions, a significant and unfortunate departure from longstanding common carrier tradition. I. Pool, Technologies of Freedom 75 (1983). In short, the telephone line is no longer a

transparent medium between caller and receiver.

By contrast, the beep-tone method leaves all of the decision-making to adult message providers and telephone subscribers. If an adult message provider prefaces its recorded message with a specified beep-tone and a telephone subscriber installs a beep-tone device, the message provider and telephone subscriber will never connect over the telephone line. Hence, the common carrier remains totally transparent in the access restriction process.

In short, the beep-tone method proposed by Amicus is a feasible and effective way to restrict children's access to adult message services. It provides a sufficiently reliable way to separate children from adults who

wish to call adult message services.[5] And it does so with minimal intrusions on the First Amendment rights of the adult population and with only nominal burdens on parents.

CONCLUSION

For the reasons stated, the order of the district court should be

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[5] In upholding the FCC's ban on the broadcast of indecent material on daytime radio, the Court recognized the inability to separate children from adults in the viewing and listening audience. FCC v. Pacifica Foundation, 438 U.S. 726, 749-750 (1978). Amicus wishes to point out to the Court that the beep-tone method may also be employed in the broadcast and videotape media. An adult radio broadcast might, for example, emit an inaudible beep-tone signal continuously or intermittently during the broadcast. Radios with integrated and selectively activated beep-tone devices might then block reception of the broadcast. Regarding the videotape medium, the rating of a program may be encoded on the tape itself. Then, a parent can preset, via lock and key, the family videotape player to only playback programs with certain ratings. Thus, a parent can limit their children's access to adult videotapes when the parent is not physically present.

affirmed insofar as it enjoins enforcement of the statute prohibiting "indecent" speech.

Dated: March 23, 1989

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